

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 94-12463
Chapter 7

MICHAEL AARON HOWARD,
f/d/b/a Trinity Motors
DIANE FLO HOWARD

Debtors

C. KENNETH STILL, TRUSTEE

Plaintiff

v.

Adversary Proceeding
No. 95-1021

FORT PAYNE AUTO AUCTION, INC.,

Defendant

MEMORANDUM OPINION

In this adversary proceeding, the Trustee, C. Kenneth Still, seeks judgment against Fort Payne Auto Auction, Inc., for the value of certain property transferred to the defendant by the debtor, Michael Aaron Howard, within ninety (90) days immediately preceding the filing of the petition as payments made on antecedent obligations of the debtor to the defendant.

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding as provided by 11 U.S.C. § 157(b)(2)(F).

The following constitute findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52 and Bankruptcy Rule 7052.

The parties have stipulated certain facts:

The debtor, Michael Aaron Howard, formerly operated a used car business as a sole proprietorship under the trade name Trinity Motors. The defendant is a corporation organized and existing pursuant to the laws of the State of Alabama and operates as an auction house. Auctions conducted by the defendant are open to the general public and are not otherwise confined to dealers or wholesalers. The debtor had participated in various auctions with the defendant and its predecessor, Hughes Auto Auction, for the previous five (5) years.

On May 12, 1994, the debtor purchased a 1987 Chevrolet Astro van from the defendant's auction. The debtor was the high bidder at the auction for the amount of \$3,300.00. The auctioneer's fee and document fee brought the total sales price to \$3,375.00. The parties memorialized such purchase by the execution of a form agreement prepared by the defendant entitled "Title Warranty and Bill of Sale".

At the time of the sale, the debtor provided to the defendant a bank draft. Title to the vehicle was to be placed in the draft and would be given to the defendant when the draft was honored by his bank. The debtor took possession of the vehicle at the time of the sale on May 12, 1994.

The debtor's draft was subsequently dishonored by his bank. Thereafter, the debtor purchased from the defendant a 1990 Ford Escort, a 1989 Chevrolet S-10 pickup, and a 1989 Pontiac Grand Am, at the auction sale on May 26, 1994. As is provided in the Title Warranty and Bill of Sale agreements with regard to these purchases, the debtor bid \$2,670.00 for the Ford Escort, \$4,280.00 for the Chevrolet S-10, and \$3,275.00 for the Pontiac Grand Am. Drafts for these vehicles were likewise dishonored by the debtor's bank.

Upon notification by the defendant to the debtor that the four (4) drafts had not been honored, the debtor provided the defendant with checks totaling \$13,580.00 on June 3, 1994. These checks were returned to the defendant by the debtor's bank due to insufficient funds. As with his purchase of the Astro van on May 12, the debtor took possession of the other vehicles at the time of the sale.

Upon the dishonor of the debtor's checks, the debtor returned all four (4) vehicles to the defendant. Thereafter, the vehicles were sold and the net sales price for the 1989 Pontiac Grand Am was \$3,000.00, for the 1990 Ford Escort, \$2,675.00, for the 1989 Chevrolet S-10 pickup, \$3,925.00, and for the 1987 Chevrolet Astro van, \$2,645.00.

The debtor and Mr. Steve Kelley, the manager of Fort Payne Auto Auction, Inc., testified at trial. Other than testimony consistent with the stipulated facts, their testimony was almost exclusively their belief or understanding as to the law of Alabama as to sales of motor vehicles at auction, such as the auction conducted by the defendant. The debtor did testify that he transferred a Nissan Maxima vehicle with a value of \$700 - \$800

to the defendant to be applied on his debt. The debtor filed this voluntary petition on July 8, 1994. Thus, all of the transactions here at issue occurred within ninety (90) days before the date of the filing of the petition.

11 U.S.C. § 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made -
 - (A) on or within ninety (90) days before the date of the filing of the petition; . . . and
- (5) that enables such creditor to receive more than such creditor would receive if -
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The defendant has not raised any of the defenses provided in subsection (C).

The debtor is presumed to have been insolvent on and during the ninety (90) days

immediately preceding the date of the filing of the petition. 11 U.S.C. § 547(f). Defendant has offered no proof to the contrary.

The transfer of an interest of the debtor as required under § 547(b) occurred, if at all, at the point in time when the debtor returned the vehicles to the defendant. The defendant argues that the debtor had no ownership rights in the vehicles at that time. The defendant's reliance upon § 7-9-401 of the Code of Alabama and the case of *Ledbetter v. Darwin Dobbs Company, Inc.*, 473 So. 2d 197, 199 (Ala. 1985), is misplaced. Section 7-9-401 of the Code of Alabama is, for all practical purposes, identical to § 2-401 of the Uniform Commercial Code. As has been noted, § 2-401(1) purports to allow the parties to control passage of title, as between them by contract terms. Section 2-403, however, governs title vis-a-vis third parties. *White & Summers, Uniform Commercial Code, 2d ed.*, § 3-11, p. 139.

While it is clear that as between the defendant and the debtor, the debtor did not acquire an absolute ownership of the vehicles at the time he took possession because of the dishonor of the drafts, it is equally clear that the debtor acquired an interest that he could have transferred to a bona fide purchaser. ALA. CODE § 7-2-403. *Ledbetter v. Darwin Dobbs Company, Inc.*, *supra*. In *Ledbetter*, the Alabama court referred to the ownership rights of a purchaser giving a dishonored check as a voidable title. Other courts have referred to this as a conditional sale. The UCC and ALA. CODE § 7-2-401 specifically provides: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (Article 9),

title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.” Alabama Code § 7-9-301(1)(b) provides: “Except as provided in subsection 2, an unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected.

Thus, any of the debtor’s creditors could have obtained rights in the vehicles superior to the rights of the defendant at any time between the time delivery was made to the debtor and the time the debtor returned the vehicles to the defendant. The defendant had no more than an unsecured security interest in the vehicles.

Thus, we now arrive at the purpose of the Bankruptcy Code and in particular the provision for preferential transfers. That is to allow the trustee to recover such transfers made within ninety (90) days preceding the filing of the petition so as to discourage debtors from favoring certain creditors prior to the filing of a petition at the expense of other creditors. Section 547, to the extent possible, places all creditors on a pro rata basis *vis-a-vis* the debtor’s assets as of ninety (90) days preceding the filing, or one (1) year in certain circumstances.

The defendant also argues that the transfer was not for an antecedent debt. Clearly, the debtor owed the defendant for these vehicles at the moment he took possession. The transaction was not void, it was merely voidable.

Thus, the court concludes that a transfer of an interest of the debtor in property was made to or for the benefit of the defendant for or on account of an antecedent debt owed by the debtor before such transfer was made, made while the debtor was

insolvent, made on or within ninety (90) days before the date of the filing of the petition, and enabled the defendant to receive more than it would have received in this case had the transfer not been made.

Without any proof to the contrary, the court finds that the value of the property transferred was \$12,945.00, including \$700.00 value placed on the Nissan Maxima vehicle. Accordingly, a judgment shall issue in favor of the trustee against Fort Payne Auto Auction, Inc., for the sum of Twelve Thousand Nine Hundred Forty Five Dollars (\$12,945.00) together with interest thereon at the federal rate from and after February 1, 1995, the date of the filing of the complaint herein.

BY THE COURT

entered 7/13/1995

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE